Supreme Court, U.S.
FILED
NOV 8 1991
OFFICE OF THE CLERK

91-763

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

—v.—

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BONNIE GARONE
ALLISON COREY MILLER
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Of Counsel:

STEVEN ALAN REISS
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

RICHARD J. DAVIS
Counsel of Record
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether the relevant actions of the Republic of Argentina and Banco Central de la Republica Argentina constitute commercial activity within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611.

2. If so, whether those actions caused a direct effect in the United States sufficient to confer subject matter jurisdiction over this action pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	9
I. Certiorari Should Be Granted To Clarify The Confusion And Inconsistent Interpretation Of The "Commercial Activity" Exception Under The FSIA And To Review The Test Used By The Second Circuit, Which Too Narrowly Defined The Conduct Subject To Analysis Under The Act And Is Thus In Conflict With Decisions Of Other Circuits	13
II. Certiorari Should Be Granted To Review The Second Circuit's Holding, Which Conflicts With Decisions Of The Third, Fifth, Ninth and District of Columbia Circuits, That There Is A "Direct Effect" In The United States Sufficient To Support FSIA Jurisdiction In The Absence Of A Substantial Effect In This Country On The Parties Before The Court	17
CONCLUSION	21
APPENDIX A: Opinion of the United States Court of Appeals for the Second Circuit	1a

PAGE

APPENDIX B: Opinion of the United States District Court for the Southern District of New York..... 16a

APPENDIX C: Order of the United States Court of Appeals for the District of Columbia Circuit in *Practical Concepts, Inc.* v. *Republic of Bolivia*, No. 85-6001 (Oct. 4, 1986)..... 30a

TABLE OF AUTHORITIES

Cases: PAGE

Allied Bank Int'l v. *Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985) 8, 20, 21

America West Airlines, Inc. v. *GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989).....18, 19

Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 10

Asociacion de Reclamantes v. *United Mexican States*, 561 F. Supp. 1190 (D.C.D.C. 1983), *aff'd on other grounds*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985)..... 14

Callejo v. *Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985)..... 12

City of Englewood v. *Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985) 11-12

Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)..... 2, 7

Compania Mexicana de Aviacion, S.A. v. *United States Dist. Court*, 859 F.2d 1354 (9th Cir. 1988) .. 7

De Sanchez v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985) 12, 15, 16

Foremost-McKesson, Inc. v. *Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990)..... 7

Gregorian v. *Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989).....11, 12

International Ass'n of Machinists v. *OPEC*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982)..... 14

PAGE

International Hous. Ltd. v. *Rafidain Bank Iraq*, 893 F.2d 8 (2d Cir. 1989) 18

Joseph v. *Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988) 11

MacArthur Area Citizens Ass'n v. *Republic of Peru*, 809 F.2d 918 (D.C. Cir.), *modified on other grounds*, 823 F.2d 606 (D.C. Cir. 1987) 11, 16

Maritime Int'l Nominees Estab. v. *Republic of Guinea*, 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983) 18, 19

Martin v. *Republic of South Africa*, 836 F.2d 91 (2d Cir. 1987) 18

Millen Indus., Inc. v. *Coordination Council*, 855 F.2d 879 (D.C. Cir. 1988) 12

MOL, Inc. v. *Peoples Republic of Bangladesh*, 736 F.2d 1326 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984) 12

Ohntrup v. *Firearms Ctr., Inc.*, 516 F. Supp. 1281 (E.D. Pa. 1981), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985).....18, 19

Practical Concepts, Inc. v. *Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987) 12

Rush-Presbyterian-St. Luke's Medical Ctr. v. *Hellenic Republic*, 877 F.2d 574 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989) 11, 16, 18

Segni v. *Commercial Office of Spain*, 835 F.2d 160 (7th Cir. 1987) 11

Segni v. *Commercial Office of Spain*, 816 F.2d 344 (7th Cir. 1987) 7

PAGE

Shapiro v. *Republic of Bolivia*, 930 F.2d 1013 (2d Cir. 1991) 7-8, 13, 14

Stena Rederi AB v. *Comision de Contratos del Comite Ejecutivo Gen. del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380 (5th Cir. 1991).....11, 17-18

Texas Trading & Milling Corp. v. *Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).....14, 17, 18, 19

The Schooner Exchange v. *M'Faddon*, 11 U.S. 116 (1812) 9

Vencedora Oceanica Navigacion, S.A. v. *Compagnie Nationale Algerienne de Navigacion (C.N.A.N.)*, 730 F.2d 195 (5th Cir. 1984) 10

Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983).....9, 10, 19, 20

Victory Transp. Inc. v. *Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) 10

Weltover, Inc. v. *Republic of Argentina*, 941 F.2d 145 (2d Cir. 1991) .....*passim*

Weltover, Inc. v. *Republic of Argentina*, 753 F. Supp. 1201 (S.D.N.Y. 1991)..... 2

Zernicek v. *Brown & Root, Inc.*, 826 F.2d 415 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988) 18, 19

PAGE

Statutes:

Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602-1611:

Generally 2, 9

§ 1603(a) 3

§ 1603(d) 3, 15, 17

§ 1604.....2, 10-11

§ 1605(a)(2).....2-3, 13, 18

28 U.S.C. § 1254(1) 2

Miscellaneous:

House Judiciary Comm., *Jurisdiction of U.S. Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604.....9, 10, 11, 12, 14

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. (1976).....17, 19

Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dept. of State Bull. 984 (1952) 10

Restatement (Second) of the Foreign Relations Law of the United States § 18 (1965).....8, 9, 18, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

—v.—

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully request that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Second Circuit, entered on August 13, 1991.[1]

OPINIONS BELOW

The opinion of the Circuit Court is reported at 941 F.2d 145 (2d Cir. 1991), and is set forth in Appendix ("App.") A hereto at 1a-15a.[2] The opinion of the District Court is

---

1 The caption of the case in this Court contains the names of all parties.

2 References to the Appendix to this Petition are cited herein as "App. at ___a."

reported at 753 F. Supp. 1201 (S.D.N.Y. 1991) and is set forth in Appendix B hereto, App. at 16a-29a.

JURISDICTION

A. The Petition is timely filed within ninety (90) days of the decision of the United States Court of Appeals for the Second Circuit dated August 13, 1991.

B. The decision of the Circuit Court affirmed an Order of the District Court for the Southern District of New York which denied Petitioners' motion to dismiss the complaint for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611. Jurisdiction in the Circuit Court rested upon the "collateral order doctrine" (App. at 2a (citing *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949)).

C. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (the "FSIA" or the "Act"), provides in relevant part as follows:

> **§ 1604. Immunity of a foreign state from jurisdiction**
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.
>
> **§ 1605. General exceptions to the jurisdictional immunity of a foreign state**
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the

States in any case—

. . . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

§ 1603. Definitions

For purposes of this chapter—

. . . .

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

STATEMENT OF THE CASE

This action arises from Respondents' attempt to compel the Argentine government Petitioners[3] to perform under the terms of certain instruments issued in 1982. These instruments, titled Registered Bonds Denominated in United States Dollars—called "Bonods"—raised no capital, and were not used to finance the acquisition of any goods or services. Rather, they were created and issued by the Argentine government as necessary steps in its administration of the government's own obligations under a program designed to protect access to credit within Argentina in order to avoid a credit crisis within the country's private sector.

---

3 The Republic is a foreign state as defined by § 1603(a) of the FSIA, and Banco Central, as Argentina's Central Bank, is an agency or instrumentality of the Republic under the Act.

The Bonods confirm on their face that they also were issued as a component of Argentina's program to regulate and stabilize its limited supply of foreign exchange, and refer potential holders to the governing Banco Central regulations. They provide for payment of interest and principal in United States Dollars, subject to and according to the provisions of Argentine government Decrees 1334 and 1603, excerpts of which are reproduced on each Bonod. Interest rates on the Bonods are linked to the London Interbank rate for Eurodollar deposits, and payment may be made through transfer on the London, Frankfurt, Zurich or New York market. The Bonods contain no language that submits to the jurisdiction of the United States courts, or implies that any law other than Argentine law will govern them. The Respondents, Panamanian and Swiss corporations[4] with no other stated contact with the United States, claim that they requested payment in New York.

The foreign exchange for which Petitioners substituted the Bonods was called for under the Argentine government's foreign exchange insurance contract program (the "FEIC"), begun in 1981. Foreign exchange—*i.e.*, currency that is internationally accepted—is critical to Argentina's economy, because its own local currency is not accepted in cross-border transactions. In order for Argentine entities or individuals to acquire goods and services from other countries or fulfill lending obligations, they must obtain dollars or other acceptable international currencies. Because of the central importance of foreign exchange to Argentina's economy, as well as the need to ensure the availability of adequate foreign exchange to fulfill sovereign obligations, inflows and outflows of foreign exchange were carefully controlled during the relevant time period by the various economic authorities, including Banco Central.[5]

---

4 As alleged in Respondents' complaint, Weltover, Inc. and Springdale, Inc. are Panamanian corporations, and Bank Cantrade, A.G. is a bank corporation organized and existing under the laws of Switzerland.

5 Pursuant to Argentine law, Banco Central acts "as the State's financial agent," and its "economic, financial, monetary and currency-

Under the FEIC, Argentine borrowers would pay to Banco Central on maturity a contractually defined amount of local currency, and would receive the necessary dollars to repay their foreign debt when it matured, irrespective of intervening devaluations. Absent such a program, the government's concern was that the risks of massive devaluation would severely restrict the availability of credit to local borrowers, since neither borrowers nor lenders would have adequate security as to how much local currency would be needed to purchase the foreign exchange required to repay loans. By the time the exchange insurance contracts under the FEIC began to mature in 1982, however, Argentina's economy had deteriorated further, and the Argentine currency had suffered additional massive devaluations. These conditions had been intensified by the Republic's involvement in a war related to the Malvinas in the Spring of 1982. The result of these conditions was that the government's foreign exchange reserves were wholly insufficient to meet its various foreign exchange obligations, including its obligation to provide the dollars due under the FEIC.

The Argentine government thus determined in the Fall of 1982 that it would be necessary to adopt emergency measures in order to conserve the country's limited supply of foreign exchange, which would, as one component, use financial instruments to satisfy its own obligations to provide foreign exchange under the FEIC contracts. In order for Banco Central to accomplish this, the Ministry of Economy directed it to issue Bonods, as well as other alternative financial instruments.[6]

---

exchange counsel." Organic Charter of the Central Bank of the Argentine Republic, Art. 3. Its responsibilities thus include, *inter alia*, "[r]egulation of credit within Argentina, for the purpose of fostering economic development," and "[a]dministration of the nation's reserves of gold, currency and other assets." *Id.* Banco Central's Charter expressly provides that it is prohibited from participating "directly or indirectly in any commercial . . . enterprise." *Id.* at Art. 19.

6 In order to defray the cost to Banco Central of issuing and servicing the Bonods, the Ministry determined that its own accounts would be "debi-

Because the foreign debt crisis in Argentina continued when the Bonods began to mature on May 26, 1986, the Argentine government still lacked sufficient foreign exchange to meet its obligations, including retirement of the Bonods. It was thus forced to continue its public-sector refinancing program in order to implement an ordered system of allocating scarce foreign exchange. In continuing cooperation with other sovereigns and international organizations such as the International Monetary Fund, the Republic determined that, as part of a broader program, adjustment of capital maturity dates was necessary, ultimately resulting in this lawsuit.

A. Proceedings in the District Court

The Respondents filed suit against the Petitioners in the Southern District of New York on October 18, 1989. The complaint sought immediate payment on the Bonods. The Petitioners subsequently moved the court, *inter alia*, to dismiss the complaint on the ground that subject matter jurisdiction was not present pursuant to the FSIA because the action is based upon sovereign activity of a foreign state.[7] The District Court denied the motion on January 4, 1991 (App. at 16a-29a).

The District Court held that subject matter jurisdiction was present under the commercial activity exception of the FSIA. Specifically, the District Court concluded that the action was based upon commercial activity of a foreign state, (a) notwithstanding the relationship between the Bonods and the

---

ted to handle financial services and costs engendered by issuance of the securities," and provided that Banco Central could collect from those Treasury funds a so-called "commission" of .1% of the amount of the securities it issued. Decrees 1335, 1336. Banco Central's Charter provides that the national government bear such costs. Arts. 31, 33.

7 Petitioners also sought dismissal on the grounds (1) that the court lacked personal jurisdiction over the Republic and Banco Central; and (2) that the action should be dismissed under the doctrine of *forum non conveniens*. The District Court's denial of the motion to dismiss on these issues was not a subject of the subsequent appeal.

FEIC and that the issuance of the Bonods was directly linked to the government's response to the international debt crisis, and (b) despite the court's acknowledgment that "[i]nsofar as the Currency Regulations which resulted in the issuance of the Bonods precluded payment by the original debtor in dollars and altered the schedule of payments set forth in the original contracts, the Government of Argentina may not have been engaged in commercial activity" (App. at 21a). In addition, the District Court held that Petitioners' failure to make payment on the instruments as originally scheduled had a "direct effect" in the United States, as required under the Act for jurisdiction to be present. On January 30, 1991, Petitioners filed a timely notice of appeal to the United States Court of Appeals for the Second Circuit.[8]

B. The Court of Appeals Proceedings

Two questions were presented to the Circuit Court: whether the District Court erred in holding that the relevant activity of Petitioners in administering both Argentina's domestic credit policy and its foreign exchange reserves was commercial activity under the FSIA; and whether the District Court erred in holding that Petitioners' actions within Argentina caused a direct effect here. The Circuit Court affirmed the District Court's decision on both issues.

1. *Commercial Activity.* The Circuit Court applied what appears to be a *per se* rule, adopted by the Second Circuit in a recent decision which addressed debt issued by Bolivia in the course of an archetypal commercial transaction, that "issuance of debt instruments," in any context, is commercial activity and thus subject to the jurisdiction of the United States courts under the FSIA (App. at 9a (citing *Shapiro* v.

---

8 The District Court's denial of Petitioners' motion to dismiss on the ground of sovereign immunity was immediately appealable under the "collateral order doctrine" established in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. at 545-47 (App. at 2a). *See, e.g., Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990); *Compania Mexicana de Aviacion, S.A.* v. *United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (*per curiam*); *Segni* v. *Commercial Office of Spain*, 816 F.2d 344 (7th Cir. 1987).

Republic of Bolivia, 930 F.2d 1013, 1018 (2d Cir. 1991)). The Circuit Court declined to consider the context in which Petitioners' conduct occurred, and instead elected to "isolate the specific conduct that underlies the suit," which, in this case, it viewed as the issuance of the Bonods which obligate Petitioners to pay money (App. at 8a). Accordingly, the Circuit Court concluded, "[t]he nature of this activity—the issuance of debt instruments—is clearly the type of activity that private persons can, and often do, engage in for profit" (App. at 9a).

2. *Direct Effect in the United States.* The Circuit Court concluded that Respondents' alleged nonreceipt in New York City bank accounts of the payments they are seeking to compel was a sufficient nexus with the United States to support jurisdiction under the Act, notwithstanding that Respondents are wholly foreign corporations with no other discernable connection with this country. The court acknowledged that "[l]ocalizing the effect in the United States is . . . problematic when, as here, the plaintiff is a foreign corporation having few, if any, other contacts with the United States forum" (App. at 12a). Nevertheless, the Circuit Court expressly rejected the requirement, embodied in section 18 of the *Restatement (Second) of the Foreign Relations Law of the United States* (1965) [hereinafter *Restatement (Second) of Foreign Relations Law*], and adopted by four other Circuits, that "for an effect to be considered 'direct' it must be both 'substantial' and 'foreseeable' " (App. at 11a). In its place, the Circuit Court substituted a public policy concern, which it had articulated earlier in an Act of State analysis in *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985), that the courts "preserve . . . New York's status as a world financial leader" (App. at 13a (citing *Allied Bank*)). The potential impact of refusing to extend jurisdiction to this case, the Circuit Court reasoned, might potentially affect New York's position as a respected clearinghouse of United States dollars, thus justifying the conclusion that "Congress

[would] have wanted an American court to entertain an action such as" this one (App. at 14a).

REASONS FOR GRANTING THE PETITION

1. This petition presents important questions concerning the correct interpretation and consistent application of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611. Specifically, the Court is asked to review the Second Circuit's conclusion that Petitioners' conduct falls within the FSIA commercial activity exception and thus is subject to the jurisdiction of the District Court. As discussed below, the Second Circuit's decision applied what amounts to a *per se* rule that a foreign state obligation to pay money always is commercial activity under the Act—a conclusion not supported by the statute nor adopted by any other Circuit. In addition, in ruling that Petitioners' conduct had a "direct effect" in this country for jurisdictional purposes, the Second Circuit expressly rejected the "direct effect" test embodied in the *Restatement (Second) of Foreign Relations Law* and adopted by four other Circuits. In sum, the tests employed by the Circuit Court to reach its conclusions diverge from the analysis used in other Circuits, and illustrate the pervasive confusion that exists with respect to determining whether and when the commercial activity exception confers jurisdiction over foreign government conduct.

2. The principles of grace and comity upon which the doctrine of sovereign immunity is based create an exceptional need for clarity and consistency in making jurisdictional determinations under the Act.[9] Moreover, to the extent that the decision to subject foreign governments to jurisdiction based on their commercial conduct rests in part on the princi-

---

9 *See, e.g., Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983); *The Schooner Exchange* v. *M'Faddon*, 11 U.S. 116, 135-36 (1812); *see also* House Judiciary Comm., *Jurisdiction of U.S. Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611 (noting that "disparate treatment of cases involving foreign governments may have adverse foreign relations consequences").

ples of implied consent and estoppel, foreign sovereigns are entitled to have clear notice of the principles that the courts will apply to determine whether their actions will be deemed to be commercial and thus subject to jurisdiction here. The FSIA is the only basis for invoking jurisdiction over a foreign sovereign in the courts of this country. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). It was enacted by Congress in 1976[10] in order to codify and thereby clarify the circumstances under which suit can be brought against foreign nations. House Judiciary Comm., *Jurisdiction of U.S. Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6-7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06 [hereinafter *House Report*]. As the Court recounted in *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-88 (1983), prior to the Act, the courts struggled for more than twenty years to apply this nation's "restrictive" theory of sovereign immunity based upon the State Department's suggestion, in each instance, as to whether immunity should be granted or withheld.[11] Under this *ad hoc* system of adjudication, "the governing standards were neither clear nor uniformly applied." *Verlinden*, 461 U.S. at 488.

3. For that reason, the FSIA was enacted to provide a single rule of decision under which foreign nations are presumptively entitled to immunity unless one of the narrow, statutorily-defined exceptions to immunity is present. 28

---

10 Pub. L. No. 94-583, 90 Stat. 2891 (1976).

11 The restrictive theory of immunity was articulated by the Department of State in 1952 in the Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dept. of State Bull. 984-85 (1952) [hereinafter *Tate Letter*]. Under this doctrine, foreign states are deemed immune from the jurisdiction of the courts of this country with respect to their "public" acts, and are denied immunity only with respect to their "private" or "commercial" acts. *Tate Letter* at 985; *see Vencedora Oceanica Navigacion, S.A.* v. *Compagnie Nationale Algerienne de Navigacion (C.N.A.N.)*, 730 F.2d 195, 198 (5th Cir. 1984); *Victory Transp. Inc.* v. *Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 357-60 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

U.S.C. § 1604. After 15 years of applying the statute, however, no consistent test has emerged for applying the FSIA "commercial activity" exception. *See Stena Rederi AB* v. *Comision de Contratos del Comite Ejecutivo Gen. del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 382 (5th Cir. 1991) (noting that judicial interpretation of the FSIA "is no easier now"); *Segni* v. *Commercial Office of Spain*, 835 F.2d 160, 163 (7th Cir. 1987) (noting that difficulty in applying commercial activity exception "has resulted in differing approaches on the parts of different courts"); *see also, e.g.*, App. at 7a–8a (discussing Seventh Circuit's misunderstanding of the commercial activity test applied by the Second Circuit). The need for uniform application of this provision is particularly acute because it is the most frequently-invoked jurisdictional predicate. *See House Report*, *supra* p. 10, at 6617 (characterizing the Act's commercial activity exception as "the most important instance in which foreign states are denied immunity"). Despite its importance, however, this provision has never been interpreted by this Court.

4. The lack of clear guidance in this area has caused an array of results in FSIA cases that are difficult to reconcile with each other and, in many cases, with the results in this case. *See, e.g., Gregorian* v. *Izvestia*, 871 F.2d 1515, 1522 (9th Cir.) (publication of allegedly libelous article in Soviet newspaper *Izvestia* held sovereign), *cert. denied*, 493 U.S. 891 (1989); *Rush-Presbyterian-St. Luke's Medical Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 581 (7th Cir.) (contract to reimburse physicians and an organ bank for the costs of kidney transplants ruled commercial), *cert. denied*, 493 U.S. 937 (1989); *MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918, 920 (D.C. Cir.) (purchase and operation of residential property as chancery ruled not commercial), *modified on other grounds*, 823 F.2d 606 (D.C. Cir. 1987); *Joseph* v. *Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987) (Nigeria's lease of residential property for Nigerian Consulate employees ruled commercial), *cert. denied*, 485 U.S. 905 (1988); *City of Englewood* v. *Socialist*

People's Libyan Arab Jamahiriya, 773 F.2d 31, 37 (3d Cir. 1985) (purchase and use of residential property as residence for Libya's Head of Mission to the United Nations ruled not commercial); *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1110 (5th Cir. 1985) (sale of foreign exchange held commercial); *De Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385, 1393-94 (5th Cir. 1985) (bank's issuance of check in regulation of foreign exchange reserves held sovereign); *MOL, Inc.* v. *Peoples Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir.) (government's contract for export of rhesus monkeys held not commercial), *cert. denied*, 469 U.S. 1037 (1984). Moreover, the lack of a clear standard upon which to base immunity determinations under the Act has caused some courts to revert to the pre-FSIA practice of deferring to the Department of State to resolve the question whether immunity is to be afforded to foreign state conduct in a given case. *See Practical Concepts, Inc.* v. *Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987); *see also Gregorian*, 871 F.2d at 1522 (agreeing with *amicus curiae* United States that publishing articles in *Izvestia* constitutes sovereign activity); *Millen Indus., Inc.* v. *Coordination Council*, 855 F.2d 879, 881 (D.C. Cir. 1988) (citing *Practical Concepts* with approval on this point). In *Practical Concepts*, the Court of Appeals for the District of Columbia Circuit invited the United States to present its views as *amicus curiae* in order "[t]o advance the court's just determination whether the activity in question is 'commercial' within the meaning of 28 U.S.C. § 1605(a)(2)" (App. at 31a). The Act clearly was intended to end this practice.[12] The fact that the courts continue to perceive a need for State Department input further supports the importance and timeliness of review by this Court.

---

12 *See House Report*, *supra* p. 10, at 6610 (Act discontinues "the practice of judicial deference to 'suggestions of immunity' from the executive branch").

I.

Certiorari Should Be Granted To Clarify The Confusion And Inconsistent Interpretation Of The "Commercial Activity" Exception Under The FSIA And To Review The Test Used By The Second Circuit, Which Too Narrowly Defined The Conduct Subject To Analysis Under The Act And Is Thus In Conflict With Decisions Of Other Circuits

1. This case starkly illustrates the fact that there is no consensus in the federal courts regarding the proper method of determining whether foreign state conduct constitutes commercial activity under the FSIA. 28 U.S.C. § 1605(a)(2).[13] The instruments under which the Respondents seek to compel performance in this case—the Bonods—were issued in Argentina in order to meet Petitioners' governmental obligations under Argentina's FEIC, a plainly public policy response to a perceived credit crisis which affected both Argentina's domestic economy and the central government's own foreign exchange reserves. Additionally, the Bonods raised no capital, were not the mechanism for financing acquisitions by a government entity, and the Argentine government issued them without receiving consideration commensurate with their value in any customary sense. The Bonods thus do not embody "public debt" in any classic or traditional way. The Circuit Court nevertheless imposed what amounts to a *per se* rule that Petitioners' promulgation of the Bonods was an "issuance of debt," and hence by definition commercial activity (App. at 10a).[14] The court reached this conclusion not

---

13 The portion of the FSIA that was applied in this case provides that a foreign state shall not enjoy sovereign immunity in a case:

> in which the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

28 U.S.C. § 1605(a)(2).

14 The Circuit Court rested its ruling on the Second Circuit's statement in *Shapiro* v. *Republic of Bolivia*, 930 F.2d 1013, 1018 (2d Cir. 1991),

because it was compelled by the statute—the legislative history of the Act makes it clear that governmental debts are to be subjected to the same analysis as any other foreign state conduct[15]—but because it misapplied the Act's commercial activity test.

2. The lens through which the court views the foreign state conduct before it inevitably affects its legal characterization of the activity under review. Accordingly, the first step in the FSIA commercial activity analysis is to identify the conduct that is relevant to the court's inquiry. *See, e.g., Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981) (court's "first task is to identify what particular conduct" is relevant), *cert. denied*, 454 U.S. 1148 (1982); *International Ass'n of Machinists* v. *OPEC*, 649 F.2d 1354, 1357 (9th Cir. 1981) ("immunity question may be determined by how broadly or narrowly [the] activity is defined"), *cert. denied*, 454 U.S. 1163 (1982). In this case the Circuit Court used a lens that is artificially narrow, focusing on Petitioners' single and isolated act of issuing paper which provides for the payment of money. The court thus confined its review to but a single frame of a more complicated—and legally relevant—picture. This resulted in a skewed view of the nature of Petitioners' actions and an erroneous legal conclusion that those actions constituted "commercial activity."

3. Specifically, the Second Circuit stated that it believed it was required to "isolate" the specific acts complained of by Respondents, rather than evaluate them in the context in

---

that "[i]t is self-evident that issuing public debt is a commercial activity." The transaction in *Shapiro*, however, in contrast to the issuance and rescheduling of the Bonods, was archetypical commercial conduct: the exchange of promissory notes in payment for goods.

15 In enacting the FSIA Congress elected not to include a blanket immunity for general debts of government, leaving such debts to the same analysis prescribed for other government conduct. *See House Report, supra* p. 10, at 6609; *see also Asociacion de Reclamantes* v. *United Mexican States*, 561 F. Supp. 1190, 1195-96 (D.C.D.C. 1983), *aff'd on other grounds*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985).

which they took place (App. at 8a). To do otherwise, the court concluded, would be to define the conduct "overbroadly," with the result that the government conduct at issue "would almost inevitably be characterized as sovereign in nature" (*id.*). What the Second Circuit failed to recognize, however, is that the converse also is true: if a court insists on surgically removing foreign government acts from their context, and examining them microscopically in the absence of any meaningful background, they will almost inevitably appear to be identical to conduct engaged in by private actors. Such a result is wholly inconsistent with the statutory definition of "commercial activity," which explicitly contemplates that courts will analyze not only a "transaction" or an "act," but the "nature of the course of conduct." *See* 28 U.S.C. § 1603(d).

4. This paradox, and thus the need for a clear test for defining the activity subject to FSIA review, is well illustrated by comparing this case with the decision of the Fifth Circuit in *De Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985). There, as here, the discrete acts at issue were a foreign state's issuance of, and failure to honor, a promise to pay money. The Fifth Circuit, however, concluded that this conduct was sovereign, and not commercial, after evaluating it in conjunction with the attendant circumstances. As the *De Sanchez* court explained, identical actions often may be properly characterized in different ways depending upon the context, and thus the act of issuing a check, for example, may be a simple and routine commercial sale of foreign currency, or "regulation and supervision of a nation's foreign exchange reserves," a quintessential sovereign act. 770 F.2d at 1392-93.[16] A panel of the Seventh Circuit also has recog-

16 The Fifth Circuit noted, *inter alia*, that the Nicaraguan Central Bank "became involved with [the plaintiff] only in its official role in regulating the sale of foreign exchange," and the government's "only authorized purpose in issuing [the obligation] was to maintain stable exchange rates and to allocate scarce foreign exchange reserves." *De Sanchez*, 770 F.2d at 1393. The same is true in this case, but the Second Circuit believed, incorrectly, that it was precluded from considering those facts.

nized that the *De Sanchez* court's consideration of the context and reasons for the government's actions, and its resulting conclusion that those actions were sovereign in nature, was correct. *See Rush-Presbyterian-St. Luke's Medical Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 578-79 n.5 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989). The reasoning of the Fifth and Seventh Circuits is equally applicable to this case. Accordingly, the Second Circuit's refusal to look beyond the discrete acts cited by the Respondents, to the *origin* of the debt in this case, deprived it of information critical to accurately evaluate the true nature of Petitioners' conduct, and resulted in the erroneous conclusion that Petitioners' conduct was "commercial activity."

5. The District of Columbia Circuit also appears to have implicitly rejected the approach advocated by the Second Circuit, which would confine the courts to the discrete acts in dispute between the parties and prohibit consideration of the context in which those acts took place. *See MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918 (D.C. Cir.), *modified on other grounds*, 823 F.2d 606 (D.C. Cir. 1987). In *MacArthur*, a neighborhood association brought suit against the Republic of Peru for alleged violations of local zoning laws caused by the Republic's purchase, renovation and operation of formerly residential property as a chancery. The court rejected the plaintiffs' contention that those acts constituted commercial activity and thus brought the case within the jurisdiction of the District Court. Rather, the *MacArthur* court determined the nature of the foreign government conduct by evaluating it in context. As a result, the court held that subject matter jurisdiction was not present, because it concluded that "operation of a chancery is, by its *nature* . . . governmental, not commercial" even though maintaining a building, in isolation, plainly is an activity private citizens can and regularly do conduct. *Id.* at 920 (emphasis in original).

6. Congress did not include a precise definition of "commercial activity" in the statute, but rather " 'put [its] faith in the U.S. courts to work out progressively, on a case-by-case

basis . . . the distinction between commercial and governmental.' " *Texas Trading*, 647 F.2d at 309 (quoting *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 53 (1976) [hereinafter *House Hearings*] (testimony of Monroe Leigh, Legal Advisor, Department of State)).[17] The legislative history indicates that the courts should use as their standard "whether the activity in question is one which private parties ordinarily perform." *House Hearings*, at 53 (testimony of Monroe Leigh). The outcome of any test for distinguishing between sovereign and commercial conduct, however, is determined in the first instance by how narrowly or broadly the Court defines the relevant foreign state conduct. For that reason, review by this Court of the Second Circuit's artificially narrow view of the conduct subject to FSIA analysis is necessary and important.

II.

Certiorari Should Be Granted To Review The Second Circuit's Holding, Which Conflicts With Decisions Of The Third, Fifth, Ninth and District of Columbia Circuits, That There Is A "Direct Effect" In The United States Sufficient To Support FSIA Jurisdiction In The Absence Of A Substantial Effect In This Country On The Parties Before The Court

1. The FSIA provides that even where a foreign state has engaged in commercial activity, the sovereign's acts must have a sufficient nexus with the United States in order to support jurisdiction. *See Stena Rederi AB* v. *Comision de Contratos del Comite Ejecutivo Gen. del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mex-*

---

17 In the only statutory guide as to how the courts should determine whether particular conduct is commercial or governmental, the Act counsels that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

icana, S.C., 923 F.2d 380, 386 (5th Cir. 1991); *America West Airlines, Inc.* v. *GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989). This case squarely presents a split in the Circuits as to the proper test for determining whether a foreign state's commercial activity outside this country has a "direct effect" in the United States under the Act.[18] As the Circuit Court noted in this case, the Second Circuit expressly has rejected the "substantial" and "foreseeable" test embodied in the *Restatement (Second) of Foreign Relations Law*, which is followed by the Third, Fifth, Ninth and D.C. Circuits[19] (App. at 11a (citing *International Hous. Ltd.* v. *Rafidain Bank Iraq*, 893 F.2d 8, 11 n.2 (2d Cir. 1989); *Martin* v. *Republic of South Africa*, 836 F.2d 91, 94 (2d Cir. 1987); *Texas Trading*, 647 F.2d at 311 n.32)). Instead, the Second Circuit based its finding of a direct effect sufficient to support FSIA jurisdiction in this action on localized policy concerns that have not been invoked by any other court. Review by this Court is needed to resolve this conflict among the Circuits.

2. The Respondents are foreign corporations having no stated connection with this country other than the alleged nonreceipt of payment in unidentified bank accounts in New York City. Nevertheless, the Second Circuit found that Petitioners' failure to pay principal and interest to those accounts as scheduled caused a direct effect in the United States sufficient to evoke the jurisdiction of the District Court under the FSIA (App. at 12a). Prior to this decision, the Second Circuit held that the nonpayment of a debt payable in the United

---

18 Specifically, section 1605(a)(2) provides for jurisdiction where "an act outside the territory of the United States . . . causes a direct effect in the United States."

19 *See America West Airlines*, 877 F.2d at 799; *Zernicek* v. *Brown & Root, Inc.*, 826 F.2d 415, 417-18 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); *Maritime Int'l Nominees Estab.* v. *Republic of Guinea*, 693 F.2d 1094, 1110-11 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983); *Ohntrup* v. *Firearms Ctr., Inc.*, 516 F. Supp. 1281, 1286 (E.D. Pa. 1981), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985). *See also Rush-Presbyterian-St. Luke's Medical Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 581 (7th Cir.) (stating that the "effects of a foreign state's actions must be 'substantial' and 'direct and foreseeable' "), *cert. denied*, 493 U.S. 937 (1989).

States to a United States company constitutes a direct effect in the United States. *See Texas Trading*, 647 F.2d at 312. This decision marks the first time the Second Circuit has held that a foreign sovereign's nonpayment of a debt payable in the United States to a *foreign* corporation has a direct effect in this country. Such an effect, however, clearly is not substantial in any respect, as required by the other Circuits that previously have interpreted the direct effects clause of the Act.

3. The *Restatement (Second) of Foreign Relations Law* test requires that a foreign state's acts cause effects in this country that are not only "direct and foreseeable" but also are "substantial" in order to support jurisdiction. *See, e.g., America West Airlines*, 877 F.2d at 799; *Zernicek*, 826 F.2d at 417-18; *Maritime Int'l*, 693 F.2d at 1111; *Ohntrup*, 516 F. Supp. at 1286 (all requiring that the effect in the U.S. be not only direct but also substantial).[20] These requirements address Congress' concern that the United States courts not become " 'international courts of claims' . . . [by] requiring some form of substantial contact with the United States." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 490 (1983) (citing *House Hearings*, *supra* p. 17, at 31 (testimony of Bruno A. Ristau)).

4. The Second Circuit has expressly rejected the *Restatement (Second) of Foreign Relations Law* test, including the requirement that the effect here on the complaining parties be substantial (App. at 11a). The Second Circuit acknowledged that the effect of the subject foreign state's actions must be "sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case" (App. at 12a). It went on, however, to ignore Con-

---

20 This test evolved from the legislative history of the FSIA, which indicates that the direct effects clause should be interpreted in a manner "consistent with principles set forth" in Section 18 of the *Restatement (Second) of Foreign Relations Law*. *House Report* at 6618. Section 18 of the *Restatement (Second)* requires that the conduct abroad cause an effect in the United States that is "substantial" and "occurs as a direct and foreseeable result of the conduct outside the territory."

gress' direction in two important respects: that the acts at issue causing the direct effect must be those of the foreign government, and that they must have an important effect in the United States on the parties before the Court.

5. Specifically, the Second Circuit, in contrast to the other courts that have addressed this question, rested its finding of a jurisdictional direct effect not on any effect here on the plaintiffs caused by Petitioners' actions, but rather upon its concern about the practical ramifications of a decision to deny jurisdiction (App. at 14a). Specifically, relying on its earlier Act of State decision in *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985), the Circuit Court substituted its own unique policy considerations with respect to "enhanc[ing] New York's status as a world financial leader," for the FSIA's requirement that the conduct at issue cause a direct effect in the United States to the particular plaintiffs before the Court (App. at 13a (citing *Allied Bank*)). Reliance on this type of policy concern is improper for three reasons.

6. First, the principle of comity which underlies the sovereign immunity doctrine compels that jurisdiction over a foreign government be asserted only as a result of that government's actions here, or the effect that government's action causes here. Second, in order to limit the Act's grant of statutory jurisdiction to disputes that have a sufficient connection with this country, Congress indicated that it intended United States courts to have jurisdiction over a foreign state *only* when there is a direct effect in the United States on the particular plaintiff before the court. *Verlinden*, 461 U.S. at 490. Third, if the kind of generalized interests analysis used by the Circuit Court were sufficient to find jurisdiction, the statutory requirement that the effect be "direct" would have been rendered meaningless.

7. The fact that the Second Circuit relied solely upon its analysis in *Allied Bank* to support its conclusion in this case is evidence of a serious confusion regarding the proper interplay between the Act of State doctrine and the threshold

jurisdictional analysis required under the FSIA. In contrast to the issues raised here, *Allied Bank* involved Act of State concerns and *not* a determination as to whether there was subject matter jurisdiction under the Act. An Act of State analysis, however, weighs the respective interests of the United States and the foreign government only *after* the court concludes that it has jurisdiction over the case pursuant to the FSIA. In this case, the Second Circuit's erroneous method of analysis clearly was the reason for its conclusion that jurisdiction is present here.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BONNIE GARONE
ALLISON COREY MILLER
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Of Counsel:

STEVEN ALAN REISS
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

RICHARD J. DAVIS
Counsel of Record
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 1446, 91-7119.

WELTOVER, INC.; SPRINGDALE ENTERPRISES, INC.; BANK CANTRADE, A.G.,

Plaintiffs-Appellees,

v.

REPUBLIC OF ARGENTINA; BANCO CENTRAL DE LA ARGENTINA,

Defendants-Appellants.

Argued May 23, 1991.
Decided Aug. 13, 1991.

Before MESKILL, MINER and MCLAUGHLIN

MCLAUGHLIN, *Circuit Judge*:

This appeal presents two issues of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). 28 U.S.C. §§ 1330, 1332(a)(2)-(a)(4), 1391(f), 1441(d), 1602-1611. We must first determine whether the act of a foreign sovereign in issuing debt instruments to foreign creditors for the stated purpose of controlling the nation's stock of foreign currency is "commercial activity" within the meaning of the FSIA. If it is, we must then consider whether that action has a sufficient nexus with the United States to justify the exercise of subject matter jurisdiction over the foreign sovereign in an American court.

Plaintiffs, Weltover, Inc. ("Weltover"), Springdale Enterprises, Inc. ("Springdale"), and Bank Cantrade, A.G. ("Bank Cantrade"), sued defendants, the Republic of Argentina ("Argentina" or "the Republic") and Banco Central de la Argentina ("Banco Central"), to recover principal and interest due on certain bonds ("Bonods") issued by defendants. Plaintiffs are holders of a number of these Bonods with a total face value in excess of $1.3 million. Weltover and Springdale are Panamanian corporations; Bank Cantrade is a Swiss bank. Each plaintiff elected, pursuant to a contractual option provided for in the Bonods, to have payment made in New York. Upon defendants' default, plaintiffs commenced the present action. Defendants moved to dismiss for lack of subject matter jurisdiction under the FSIA, lack of personal jurisdiction, and *forum non conveniens*. Judge Sprizzo denied these motions. *Weltover, Inc.* v. *Republic of Argentina*, 753 F.Supp. 1201 (S.D.N.Y. 1991).

Defendants now appeal just the district court's ruling that subject matter jurisdiction is proper under the FSIA. We have appellate jurisdiction pursuant to the "collateral order doctrine" of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949). *See, e.g., Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C.Cir. 1990) (denial of motion to dismiss for lack of subject matter jurisdiction under the FSIA is subject to interlocutory appeal under the "collateral order doctrine"). We affirm.

BACKGROUND

Argentina's economic woes provide the backdrop for this controversy. Since the 1970's, Argentina has accumulated vast public and private foreign debts. Because Argentine currency—which, prior to 1985, was based on the peso and is presently denominated in australs—is not accepted on the international market as a valid medium of exchange, Argentina depends on its reserves of United States dollars and

other internationally recognized currencies to satisfy foreign debt.

The rapid accumulation of foreign debt in the 1970's began to deplete Argentina's reservoirs of internationally accepted currencies. To cope with this economic miasma, Argentina's Ministry of Economy adopted austere measures in the early 1980's. Banco Central, as the Central Bank of the Republic, was charged with implementing these economic and foreign exchange policies. Pursuant to the crisis-management measures adopted by the Ministry of Economy, Banco Central, in 1981, began adjusting the prevailing foreign exchange rates, which led to a severe devaluation of Argentina's local currency. Devaluation of local currency obviously made it more expensive for Argentine debtors to obtain needed foreign exchange to satisfy their debts.

To counter the devaluation problem, Banco Central implemented the Republic's Foreign Exchange Insurance Contract ("FEIC") program. The purpose of the FEIC was to provide a means by which private debtors could obtain the necessary U.S. dollars at a particular exchange rate, thus avoiding the devastating consequences of the continued devaluation of the local currency. Specifically, the FEIC allowed private Argentine debtors to pay Banco Central a pre-determined amount of local currency upon maturity of the foreign debt; Banco Central would issue the debtor the amount of U.S. dollars required to repay the foreign debt. The amount of local currency that the debtor was required to pay Banco Central was calculated at the exchange rate prevailing at the time the contract was executed, thereby lessening the impact upon the debtor of subsequent devaluations of the local currency.

This creative financing bought Argentina some time since the FEIC contracts did not come due until 1982. However, the continued economic crisis in Argentina found the Republic and Banco Central in 1982 with an insufficient stock of U.S. dollars to enable the private debtors to retire these old debts. Defendants next decided to refinance these obligations by issuing two forms of debt instruments: (1) bonds payable in U.S. dollars (Bonods), and (2) promissory notes.

The Bonods—which are at issue here—provided for payment of principal and interest in U.S. dollars, with interest to be based on the London Interbank rate for Eurodollar deposits. Payment was to be made on either the New York, London, Frankfurt, or Zurich markets, at the election of the creditor. This refinancing program gave the foreign creditor the option of accepting the Bonods in satisfaction of the initial debt, thus releasing the private debtors and substituting defendants as the debtors, or maintaining the debtor/creditor relationship with the original Argentine debtor and accepting the Bonods as guarantees and the defendants as guarantors. For issuing some $1.3 billion in Bonods, Banco Central received a one-tenth of one percent service fee ($1.3 million) from the Secretariat of State for Finance to cover the service costs. Under Argentine foreign exchange regulations adopted by the Ministry of Economy, only Banco Central could pay the creditors in U.S. dollars.

In the tumultuous years following issuance of these Bonods, Argentina's economic slide continued. On May 23, 1986, soon after initial payments of interest were made on the Bonods, the Republic determined that it was still unable to meet its foreign debt obligations. A Presidential Decree required the Ministry of the Economy to direct Banco Central to establish, yet again, alternative means to pay foreign debt instruments such as the Bonods. Pursuant to this Decree, Banco Central unilaterally extended the time for payments on the Bonods, labelling this a "rescheduling." Plaintiffs, holders of the Bonods, refused to accept this "rescheduling" of payment, and brought the present action to compel defendants to honor their obligations.

In denying defendants' motion to dismiss for lack of subject matter jurisdiction under the FSIA, the district court held that defendants' actions in issuing and "rescheduling" the Bonods fit within the "commercial activity" exception of section 1605(a)(2) of the FSIA. *Weltover*, 753 F.Supp. at 1205-07. Judge Sprizzo explored the nature of the act of issuing public debt and determined that it constituted "commercial activity." *Id.* at 1205-06. He went on to hold that there was a sufficient nexus between defendants' acts and the

United States to justify the exercise of subject matter jurisdiction by an American court. *Id.* at 1206-07.

DISCUSSION

Traditional precepts of international law accord sovereign immunity to foreign countries and their agencies or instrumentalities. In its pristine form, the doctrine of sovereign immunity was absolute, but as governments increasingly entered the marketplace to undertake what had previously been private commercial enterprise, the doctrine began to erode. The FSIA now provides a means by which a foreign sovereign and its agencies or instrumentalities may be subjected to the jurisdiction of American courts. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 688, 102 L.Ed.2d 818 (1989). The Republic and Banco Central are foreign states within the meaning of the FSIA. *See* 28 U.S.C. § 1603(a) & (b). The parties do not dispute any of these basic principles.

The FSIA codifies the only exceptions to the traditional notion of absolute foreign sovereign immunity. *See* 28 U.S.C. §§ 1605-1607; *see also* H.R.Rep. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S.Code Cong. & Admin. News 6604, 6605 ("*House Report*") (FSIA codifies the "restrictive" theory of foreign sovereign immunity that was first adopted by the Department of State in the famous Tate Letter of 1952). When one of these exceptions applies, the foreign sovereign is stripped of immunity, and, pursuant to 28 U.S.C. § 1330(a), subject matter jurisdiction exists in the district court. *See Amerada Hess Shipping Corp.*, 488 U.S. at 434, 109 S.Ct. at 688; *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493, 103 S.Ct. 1962, 1971, 76 L.Ed.2d 81 (1983). Whether the Republic and Banco Central may assert immunity thus turns on whether one of the FSIA's exceptions applies.

We are called on to determine whether defendants' act of issuing the Bonods and subsequently failing to pay the bonds on time falls within the so-called "commercial activity"

exception of the FSIA. 28 U.S.C. § 1605(a)(2). Specifically, section 1605(a)(2) provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . .
>
> (2) in which the action is based [i] upon a commercial activity carried on in the United States by the foreign state; or [ii] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [iii] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

All parties agree that the third clause [iii] of subsection (2) governs the present case. The issues, then, are whether defendants engaged in "commercial activity," as opposed to sovereign activity, and whether such activity has caused a "direct effect in the United States." Judge Sprizzo answered both questions in the affirmative and we agree.

Commercial Activity

Congress' definition of "commercial activity" is our starting point, although it provides limited guidance: "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

Obviously aware that this Olympian generality might be thought unilluminating, Congress explained that it would be both unnecessary and unwise "to attempt an excessively precise definition of ['commercial activity']." *House Report* at 6615. Instead, Congress intended to grant a "great deal of

latitude" to the federal courts in distinguishing between commercial acts and sovereign acts. *Id.*; *see Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 308-09 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982). The House Report, however, listed several examples of activities by a foreign sovereign that would fall within the definition of commercial activity. One such illustration is a foreign government's "borrowing of money." *House Report* at 6615.

This Court has attempted to establish somewhat less amorphous standards for determining what is commercial activity. We have construed the FSIA to mean that "if the activity is one in which a private person could engage, [the foreign sovereign] is not entitled to immunity." *Texas Trading*, 647 F.2d at 309. Other circuits have basically taken the same pragmatic approach. *See, e.g., Rush-Presbyterian-St. Luke's Medical Center* v. *Hellenic Republic*, 877 F.2d 574, 578 (7th Cir.) ("If a private person could have engaged in the same *type* of activity, then the sovereign has presumptively engaged in 'commercial activity' within the meaning of the FSIA . . . ."") (emphasis in original), *cert. denied*, __ U.S. __, 110 S.Ct. 333, 107 L.Ed.2d 322 (1989); *Practical Concepts, Inc.* v. *Republic of Bolivia*, 811 F.2d 1543, 1549-50 (D.C.Cir. 1987).

It should be noted, however, that the Seventh Circuit appears to have read too much into our holding in *Letelier* v. *Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125, 105 S.Ct. 2656, 86 L.Ed.2d 273 (1985). In *Rush-Presbyterian*, the Seventh Circuit intimated that, for acts to be considered commercial, the Second Circuit requires a showing that the activities could be conducted by a private person *and* that the foreign sovereign has a profit motive. *See Rush-Presbyterian*, 877 F.2d at 578 n. 4. *Letelier* did not so hold, and we reject this gloss.

In *Letelier* we stated that, for an act to be considered commercial, it must be the type that a private person could engage in. 748 F.2d at 797. We continued by stating that "the court must inquire whether the activity is of the type an individual *would customarily* carry on for profit." *Id.*

(emphasis added). *Letelier* did not go so far as to require a profit motive on the part of the foreign sovereign. Such a requirement would eviscerate the "commercial activity" exception of the FSIA, because foreign sovereigns often act without a profit motive. Our decision in *Letelier* clearly did not intend such a result. Rather, *Letelier* instructs that where a private party would customarily engage in an activity for profit, there can be little question that that private party is engaging in commercial activity. *See House Report* at 6615; *Joseph* v. *Office of Consulate General of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988). When a foreign sovereign engages in the same conduct, that activity retains its commercial nature, even though the foreign sovereign acts without a profit motive.[1]

In considering whether a private person could engage in the activity in question, and would normally conduct such activity for profit, we must isolate the specific conduct that underlies the suit, rather than focusing on "the broad program or policy of which the individual transaction is a part." *Rush-Presbyterian*, 877 F.2d at 580; *see Texas Trading*, 647 F.2d at 308 (court must identify particular conduct that is relevant). Were we to define the relevant conduct overbroadly, the activity would almost inevitably be characterized as sovereign in nature, rather than commercial. Foreign sovereigns constantly implement broad programs intended to stimulate their economy or to avoid economic catastrophe. Each of these programs, however, is implemented through numerous individual transactions. To imbue each transaction with a sovereign character simply because it is part of a broader governmental scheme would run afoul of the FSIA's restrictive theory of foreign sovereign immunity. *See House Report*

---

1 The district court found that the 0.1% commission received by Banco Central represents a profit. We express no view on this conclusion, for we note again that a foreign sovereign need not have a profit motive for its acts to be commercial. *See Letelier*, 748 F.2d at 797; *Joseph*, 830 F.2d at 1024 (profit motive not a "*threshold requirement*" for commercial activity) (emphasis in original).

at 6605 (immunity for foreign states restricted to public acts of the sovereign). Overbroad definition of the issue takes the Court perilously close to the shadowy line between the *nature* and the *purpose* of the activity in question. The FSIA clearly dictates that, in distinguishing commercial acts from sovereign acts, courts should refer to the nature of the activity, and not its purpose. 28 U.S.C. § 1603(d).

We recognize, of course, that "nature" and "purpose" are closely-knit concepts and that "the purpose of an act may be *relevant* in defining its nature . . . ." *Joseph*, 830 F.2d at 1023 (emphasis in original); *see also De Sanchez* v. *Banco Central De Nicaragua*, 770 F.2d 1385, 1393 (5th Cir. 1985) ("[o]ften, the essence of an act is defined by its purpose"). Nevertheless, the activity's purpose must remain ancillary to its nature, and we must " 'confine any consideration of purpose as closely as we can, considering that purpose *only so far as is absolutely necessary* to define the nature of the act in question.' " *Rush-Presbyterian*, 877 F.2d at 577-78 (quoting *Segni* v. *Commercial Office of Spain*, 835 F.2d 160, 164 (7th Cir. 1987) (emphasis added)). When the nature of an act is transparent by reference merely to the type of activity, the purpose should not bear on the outcome.

We turn now to Argentina's activity in this case. Putting to one side defendants' attempts to cast this controversy in Keynesian terms as a response to Argentina's economic straits, we note that this case revolves around defendants' issuance of the Bonods as public debt, and the subsequent failure to retire that public debt upon maturity. The nature of this activity—the issuance of debt instruments—is clearly the type of activity that private persons can, and often do, engage in for profit. Recently, we stated that "[i]t is self-evident that issuing public debt is a commercial activity within the meaning of Section 1605(a)(2)." *Shapiro* v. *Republic of Bolivia*, 930 F.2d 1013, 1018 (2d Cir. 1991) (negotiable promissory notes issued by the Republic of Bolivia); *see Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.) (per curiam) (issuance of public debt by Russian Imperial Government in 1916 would have been commercial activity had the FSIA been in effect at the time), *cert.*

denied, 487 U.S. 1219, 108 S.Ct. 2874, 101 L.Ed.2d 909 (1988); *see also House Report* at 6615 (foreign sovereign's borrowing of money is an example of commercial activity). Because defendants' issuance of public debt—the Bonods—immersed them in the stream of international commerce in foreign currency, the nature of that act was commercial; there was nothing uniquely sovereign about this activity.

We decline defendants' implied invitation to characterize the conduct in issue as a governmental effort to conserve scarce resources, i.e., U.S. dollars. Such an overbroad characterization goes to the *purpose* of the entire program, rather than to the *nature* of the transaction in issue. *See Rush-Presbyterian*, 877 F.2d at 580 (cautioning against overbroad definition of the relevant conduct); *Texas Trading*, 647 F.2d at 308. The nature of this particular transaction is clearly commercial, and, thus, we need look no further.

Because the issuance of the debt was a commercial activity, the subsequent breach of contract cannot be cloaked in immunity. Once a sovereign enters the marketplace as a commercial actor, it " 'should be subject to all the rules of the marketplace.' " *Texas Trading*, 647 F.2d at 310 (quoting *Trendtex Trading Corp.* v. *Central Bank of Nigeria*, [1977] 2 W.L.R. 356, 369, 1 All E.R. 881). In *Texas Trading*, we implicitly discounted any claim that the breach itself could be imbued with a sovereign nature. *See id.* at 310. The focus must be on the nature of the underlying activity, rather than on the nature of the last act, i.e., the breach. We do not disagree that "[w]here a government enters into a contract in its sovereign capacity, then the breach of that contract partakes of the contract's initial sovereignty." *De Sanchez*, 770 F.2d at 1394. We believe, however, that the converse must hold true as well: where a sovereign enters the marketplace as a commercial actor, a subsequent breach of the commercial contract retains that commercial nature.

We therefore hold that the relevant acts were commercial in nature, rather than sovereign, and we proceed to consider whether the requisite nexus with the United States is present.

Direct Effect in the United States

In addition to finding that the foreign sovereign was engaged in commercial activity, the FSIA also requires a finding that the acts in question "cause[d] a direct effect in the United States." 28 U.S.C. § 1605(a)(2). In *Texas Trading*, we expressly left open the question whether a foreign sovereign's nonpayment to a foreign plaintiff of a debt payable in the United States suffices to meet this statutorily-mandated nexus. *Texas Trading*, 647 F.2d at 312. This question now squarely confronts us. We hold that defendants' acts caused a direct effect in the United States.

Parsing the statute and attempting to localize the injury is "an enterprise fraught with artifice." *Id.* We have cautioned that, rather than getting steeped in the metaphysics of such amorphous terms as "direct" and "in the United States," courts must be concerned with Congress' goal of opening the courthouse doors "to those aggrieved by the commercial acts of a foreign sovereign." *Id.*; *see Verlinden*, 461 U.S. at 490, 103 S.Ct. at 1969 (Congress intended the FSIA to provide access to American courts to both American and foreign plaintiffs). Thus, when deciding whether the effect was both "direct" and "in the United States," we must remain mindful of the congressional purpose.

This Court has never been persuaded that for an effect to be considered "direct" it must be both "substantial" and "foreseeable." *See Int'l Housing Ltd.* v. *Rafidain Bank Iraq*, 893 F.2d 8, 11 n. 2 (2d Cir. 1989) (listing contrary cases from other circuits); *Martin* v. *Republic of South Africa*, 836 F.2d 91, 94 (2d Cir. 1987); *Texas Trading*, 647 F.2d at 311 n. 32. The reference in the legislative history of the FSIA to section 18 of the Restatement (Second) Foreign Relations Law, which embodies the substantiality and foreseeability prerequisites, "is a bit of a *non sequitur*" because the Restatement section deals with the extent to which American substantive law may be applied to extraterritorial conduct, rather than the reach of a federal court's subject matter jurisdiction. *Texas Trading*, 647 F.2d at 311 & n. 32. The question before us is not whether American substantive law may govern the Bonods,

but whether an American court has jurisdiction to hear the case. To frame the issue more precisely, "[t]he question is, was the effect sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case?" *Id.* at 313. Thus, for subject matter jurisdiction purposes—i.e., the authority of the court to entertain an action—we concern ourselves with the extent of the contact with the United States to determine whether that nexus sufficiently implicates the interests of the forum jurisdiction in controlling conduct within its borders.

We need not tarry long over whether the effect, in this case, was direct. There can be no question that, pursuant to the FSIA, a "direct" effect may occur as the result of a contractual violation. *See Carey* v. *National Oil Corp.*, 592 F.2d 673, 676-77 (2d Cir. 1979) (per curiam). Where the plaintiff is a corporation, "the relevant inquiry under the direct effect clause . . . is whether the corporation has suffered a 'direct' financial loss." *Texas Trading*, 647 F.2d at 312. For the financial loss to be "direct", the corporate entity must itself be placed in financial peril as an immediate consequence of the defendant's unlawful activity. *See Upton* v. *Empire of Iran*, 459 F.Supp. 264, 266 (D.D.C. 1978) (effect is "direct" where there is no intervening element), *aff'd*, 607 F.2d 494 (D.C.Cir. 1979). When, as here, the breach of an agreement deprives the corporate plaintiff of capital to which it is lawfully entitled there is a direct financial loss to the plaintiff. Because defendants' breach of the Bonod agreement deprived plaintiffs of their contractual rights to receive payment in U.S. dollars, defendants' acts caused a direct effect to plaintiffs.

A more troublesome inquiry is whether the effect was sufficiently "in the United States" to warrant our exercise of subject matter jurisdiction. Localizing the effect in the United States is more problematic when, as here, the plaintiff is a foreign corporation having few, if any, other contacts with the United States forum. Clearly, a foreign sovereign's improper commercial acts cause an effect to the foreign corporate plaintiff in that plaintiff's place of incorporation or principal place of business. We believe, however, that a

bright-line rule limiting the situs of an effect to the foreign plaintiff's domicile, place of incorporation, or principal place of business is too facile an interpretation of the FSIA. Were it so limited, it would be the rare instance in which any foreign plaintiff could be said to suffer a direct effect in the United States.

In determining where the effect is felt directly, courts often look to the place where legally significant acts giving rise to the claim occurred. *See Zedan* v. *Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C.Cir. 1988) (legally significant event must occur in the United States). We have stated that "[a]n injury to a corporation occurs in some legally significant situs, for instance, . . . a place designated for performance of a contract . . .." *Rafidain Bank*, 893 F.2d at 11 n. 3 (citing *L'Europeenne de Banque* v. *La Republica de Venezuela*, 700 F.Supp. 114, 121-122 (S.D.N.Y. 1988)). While we determined in *Rafidain Bank* that subject matter jurisdiction did not lie under the FSIA, our rationale was based, in large measure, on the fact that "[p]ayment in New York City was not a contractual requirement . . .." *Id.* at 12.

In *L'Europeenne de Banque*, which we cited with approval in *Rafidain Bank*, the district court held that nonpayment of a debt which the foreign sovereign was contractually obligated to pay to the foreign plaintiff in the United States caused a direct effect in the United States. *See L'Europeenne de Banque*, 700 F.Supp. at 121-22. This was so because the United States had an interest in protecting the foreign plaintiff from the breach. *Id.* at 122 (citing Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U.L.Rev. 474, 512 (1980)). Support for this position has been building in the district courts for several years. *See Rafidain Bank*, 893 F.2d at 13 (Kaufman, J., dissenting) (noting the recent trend to find a direct effect in the United States because of nonpayment of a debt due to a foreign plaintiff in the United States).

We have stated, albeit in a slightly different context, that public policy should make American courts available to foreign plaintiffs if this will preserve or even enhance New York's status as a world financial leader. *See Allied Bank*

Int'l v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d Cir.) ("act of state" doctrine), *cert. dismissed*, 473 U.S. 934, 106 S.Ct. 30, 87 L.Ed.2d 706 (1985). "The United States has an interest in maintaining New York's status as one of the foremost commercial centers in the world. Further, New York is the international clearing center for United States dollars." *Id.* at 521. Such policy considerations, while enunciated in relation to the "act of state" doctrine, have an equally direct bearing on the interest of New York in encouraging foreign debtors to pay their debts that are due in New York even though the plaintiffs are not domiciled in New York. These policy considerations bear directly on the ultimate FSIA question: Would Congress have wanted an American court to entertain an action such as the present one? We think the answer must be yes.

Here, the contract gave plaintiffs the option to call for payment in New York. Plaintiffs exercised that option. The legally significant act was defendants' failure to abide by the contractual terms; i.e., to make payments in New York. The effects occurred, in the first instance, in New York, when the plaintiffs' accounts were not credited with the outstanding amount of U.S. dollars. As such, the act of nonpayment caused a direct effect in the United States.

Public policy considerations compel the conclusion that Congress would have wanted an American court to entertain this action. New York, as a preeminent commercial center, has an interest in protecting those who rely upon that reputation to do business, whether through the banking industry or otherwise. *See Allied Bank*, 757 F.2d at 521-22; *L'Europeenne de Banque*, 700 F.Supp. at 122. If individuals or corporate entities become wary of their ability to protect their rights in business transactions conducted in New York they will look elsewhere. We think it clear that Congress, in enacting the "direct effects" clause of the commercial activity exception, intended American courts to entertain actions that promote the interests of forum jurisdictions in controlling conduct that occurs within their borders. Here, an assertion of subject matter jurisdiction fulfills that congressional intent.

CONCLUSION

We hold that defendants' issuance of the Bonods and subsequent breach of the agreements was "commercial activity" within the meaning of the FSIA. Furthermore, defendants' commercial acts caused a direct effect in the United States, thus providing the statutorily-mandated nexus. As such, defendants are stripped of sovereign immunity, and the district court has subject matter jurisdiction.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. and BANK CANTRADE, A.G.,

Plaintiffs,

v.

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Defendants.

No. 89 Civ. 6926 (JES)
Jan. 3, 1991

OPINION AND ORDER

SPRIZZO, District Judge:

Plaintiffs Weltover, Inc. ("Weltover"), Springdale Enterprises, Inc. ("Springdale"), and Bank Cantrade, A.G. ("Bank Cantrade"), bring this action against the Republic of Argentina ("Argentina") and Banco Central De La Republica Argentina ("Banco Central") alleging that the defendants have breached obligations arising out of the issuance of certain bonds. The defendants move to dismiss the action for lack of subject matter jurisdiction and lack of personal jurisdiction or, in the alternative, pursuant to the doctrine of *forum non conveniens*. For the reasons that follow, the motions are denied.

BACKGROUND

Plaintiffs Weltover, Springdale and Bank Cantrade are all holders in due course of various indentures denoted as "Reg-

istered Bonds Denominated in United States Dollars," which are referred to in the parties' papers as "Bonods". *See* Complaint ¶¶ 10-15, 22-23, 29-30.[1] These indentures were issued by Banco Central, which is the financial agent for the Republic of Argentina, pursuant to Argentina's Foreign Exchange Insurance Contract ("FEIC") program. *See* Complaint at ¶¶ 5, 11; Affidavit of Daniel Marx at ¶¶ 3, 9 (sworn to April 11, 1990) ("Marx Aff.").[2]

That program, instituted in 1982, sought to deal with the devaluation of Argentinian currency on the world market by allowing an Argentinian borrower required to pay a debt in dollars to pay a specified amount of the local currency to Banco Central and receive in exchange the amount of U.S. dollars necessary to repay the loan. *See* Marx Aff. at ¶¶ 7-8. However, when the exchange insurance contracts matured in late 1982, Banco Central was unable to deliver the dollars necessary to retire the Argentine debtors' original loans. *See* Marx Aff. at ¶ 9. Accordingly, Banco Central issued two new types of instruments to refinance those debts: Bonods and promissory notes. *See id.*

The Bonods provided in relevant part that payment would be made in United States dollars on scheduled dates in 1986

---

1 Weltover, a Panamanian corporation, holds title by assignment to Bonods totalling $900,000. *See* Complaint ¶ 14. Springdale, also a Panamanian corporation, holds title by assignment to Bonods totalling $200,000. *See id.* at ¶ 22. Bank Cantrade, a Swiss Bank, holds title to Bonods totalling $230,000. *See id.* at ¶ 29.

2 The Court has considered the Marx Affidavit and the exhibits annexed thereto in determining whether subject matter jurisdiction is appropriate under the Foreign Sovereign Immunities Act. This is consistent with the Second Circuit's holdings that a court may properly rely upon affidavits and other evidence in resolving a motion challenging subject matter jurisdiction. *See, e.g., Kamen* v. *American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986); *Exchange Nat'l Bank of Chicago* v. *Touche Ross & Co.*, 544 F.2d 1126, 1130-1131 (2d Cir. 1976); *see also L'Europeenne de Banque* v. *La Republica de Venezuela*, 700 F.Supp. 114, 119 n. 6 (S.D.N.Y. 1988) (citing *Braka* v. *Bancomer, S.A.*, 589 F.Supp. 1465, 1468 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 222 (2d Cir. 1985)). Plaintiffs have not contested any of the facts relied upon herein and, indeed, have cited the Marx Affidavit and pertinent exhibits in support of their arguments.

and 1987 and would bear interest at the annual prevailing London Interbank market rate for 180-day Eurodollar deposits. Furthermore, they would be paid into a holder's account at either New York, London, Frankfurt or Zurich. *See* Complaint ¶ 16; Marx Aff. ¶¶ 10-11 & Exs. B-C.

Significantly, foreign creditors were given the option of maintaining their relationship with the original Argentine debtors, with the Bonods given in guarantee, or to accept the Bonods or promissory notes as payment of the original debt.[3] *See* Marx Aff. at ¶ 10. However, under Argentina's foreign exchange laws only Banco Central could have paid the creditors in American dollars. Moreover, Banco Central collected a commission of one-tenth percent (0.1%) in connection with the aforesaid transactions. *See* Marx Aff., Ex. B, Decree No. 1334, at Art. 6; *see also* Affidavit of Richard W. Cutler, Esq. ¶ 3 (sworn to May 29, 1990) ("Cutler Aff.").

However, financial difficulties in Argentina continued, with the consequence that on or about May 23, 1986 defendants, acting pursuant to a governmental decree and an order from the Ministry of the Economy, notified plaintiffs that

---

3 Banco Central's Communication "A" 251, dated November 17, 1982, which sets forth in detail the method by which Bonods and promissory notes would be available to refinance the debts, provides in part:

> 1.2. The instrumentation of the transactions shall be optional for the foreign creditor and may be done in any of the following forms:
>
> (a) Obligations ("Promissory Notes") of the National Government issued in U.S. dollars to the name of the creditor, for the corresponding amounts.
>
> (b) Registered Bonds of the National Government, issued in U.S. dollars in increments of U.S. $5,000 and larger denominations.
>
> (c) Since it is not the purpose of these measures to interfere in the loan contract between the debtor and creditor, if they prefer to maintain their relationship directly and instrument it in any form other than the two forms indicated above, the Central Bank is willing to examine such proposals and conditions, provided that they respect the terms of maturity indicated in Section 1.1.

Banco Central Communication "A" 251 at 2 (annexed to Marx Aff. at Ex. H.); *see also* Banco Central Communication "A" 272 (additional details regarding relevant procedures when the leaders and borrowers decide to maintain a direct relationship).

payment would not be made on the Bonods when due and requested that they participate in a "rollover" of those obligations. *See* Complaint at ¶¶ 17, 24, 31; Marx Aff. at ¶¶ 12-14. Plaintiffs refused to participate in that rollover and now assert that Banco Central is in default on its obligations under the Bonods. *See* Complaint at ¶¶ 18-20, 25-27, 32-34.

DISCUSSION

Defendants urge three grounds for dismissal of the complaint: (1) that the Court lacks jurisdiction over the defendants under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1988) ("FSIA"); (2) that the exercise of personal jurisdiction over the defendants violates due process; and (3) that the Court should dismiss the complaint under the doctrine of *forum non conveniens*.

The Foreign Sovereign Immunities Act

The FSIA provides that foreign sovereigns and their instrumentalities are immune from suit in United States courts unless the conduct complained of fits within various specified exceptions. *See Letelier* v. *Republic of Chile*, 748 F.2d 790, 793 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125, 105 S.Ct. 2656, 86 L.Ed.2d 273 (1985); *see also Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) (holding that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court). Plaintiffs argue that Argentina and Banco Central are subject to jurisdiction under the FSIA because the complaint is based upon their commercial activities, *see* 28 U.S.C. § 1605(a)(2), and because they have waived sovereign immunity.[4] *See* 28 U.S.C. § 1605(a)(1).

---

4 In light of the Court's conclusion that the defendants are subject to the "commercial activity" provision of the FSIA, the Court need not consider plaintiffs' argument that the defendants have waived sovereign immunity, either explicitly or implicitly.

The commercial activity exception to sovereign immunity provides that a foreign state does not enjoy immunity in a case where

> the action is based upon a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). In order to determine whether an action fits within this exception, the Court must consider (a) whether the action was "commercial" and (b) whether the action had a sufficient statutory nexus with the United States. *See Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1107 (5th Cir. 1985); *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982).

Commercial activity is defined in the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d); *see Texas Trading*, *supra*, 647 F.2d at 308-10. The FSIA further provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d); *see also* H.Rep. No. 1487, 94th Cong., 2d Sess. at 16, *reprinted in* 1976 U.S.Code Cong. & Admin.News 6604, 6615 ("House Report"). In applying this test, courts have focused upon whether the activity in question is one in which private parties could ordinarily engage or whether it is limited to sovereigns. *See, e.g.*, *Rush-Presbyterian-St. Luke's Medical Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 578 & n. 4 (7th Cir.) *cert. denied*, ____ U.S. ____, 110 S.Ct. 333, 107 L.Ed.2d 322 (1989); *Letelier*, *supra*, 748 F.2d at 797; *Texas Trading*, *supra*, 647 F.2d at 309-10; *Braka* v. *Bancomer, S.A.*, 589 F.Supp. 1465,

1469 (S.D.N.Y. 1984), *aff'd on other grounds*, 762 F.2d 222 (2d Cir. 1985).

The transactions at issue here fall squarely within the parameters of what private commercial entities do and have the capacity to do. In permitting creditors to substitute Banco Central's obligation to pay them in dollars for that of the original debtors in exchange for a 0.1% commission, Banco Central was performing a quintessentially commercial act. This is especially true since the existence of a profit motive, although not dispositive, is a factor the Court may properly consider in deciding what is a commercial as opposed to a sovereign act.[5] Furthermore, the creditors were not forced to accept Banco Central as a substitute obligor, but were free to maintain their prior relationship with the debtor.[6]

Indeed, the only serious argument that can be made in support of the claim that sovereign activity is at issue here is the assertion that the Bonods were issued as a consequence of Argentina's financial crisis and for the purpose of implementing Argentina's currency control regulations. However, that claim is refuted by the plain language of the FSIA itself,

---

5 The Court does not read the Second Circuit's decision in *Letelier*, *supra*, as imposing a requirement that a foreign sovereign have a profit motive in order for its activities to be considered commercial. Rather, that case stated only that a court may properly consider evidence of a profit motive in ascertaining whether the sovereign's activities are commercial. *See* 748 F.2d at 797; *see also Joseph* v. *Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988); House Report, *supra*, at 16, 1984 U.S.Code Cong. & Admin.News at 6615 ("Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed.").

6 Insofar as the Currency Regulations which resulted in the issuance of the Bonods precluded payment by the original debtor in dollars and altered the schedule of payments set forth in the original contracts, the Government of Argentina may not have been engaged in commercial activity. However, this action is not for altering the terms of the original contract and thereby inducing this breach. Instead, plaintiffs are suing Banco Central for breaching the obligation it assumed for a fee in place of the obligation of the original debtors. This action therefore is not based upon any sovereign activity of the Government, even assuming that the acts referred to above were arguably sovereign in nature.

which as noted above, requires that the Court look to the nature of the act, and not its purpose.[7]

In sum, Banco Central's obligation to pay in dollars was in its nature a contractual understanding and did not become clothed with sovereign immunity merely because in assuming that contractual obligation the Bank was implementing a foreign currency control policy on behalf of the Ministry of Economy, which was primarily responsible for fashioning and directing the monetary policies of the government of Argentina. *See* Organic Charter of the Central Bank of the Argentine Republic at Art. 3(b) (purpose of the Bank shall be "[t]o execute the exchange policy outlined by the Ministry of Economy with counsel from the Central Bank") (annexed to Marx Aff. as Ex. F); *id.* at Art. 4 ("The Bank's activity shall conform to the general directives in matters of financial, currency-exchange, monetary and economic policy that the National Government may issue through the Ministry of Economy"); *see also id.* at Art. 35 (requiring the Bank to advise and report to Ministry of Economy about monetary exchange); *id.* at Art. 38 (same).[8]

---

7 Defendants' reliance upon *DeSanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985), is misplaced. That case held that because in post-revolutionary Nicaragua the Central Bank had overall responsibility for the control and management of Nicaragua's monetary reserves the bank's decision to stop payment on a check issued by the bank when it was controlled by the former regime to the wife of the former Minister of Defense was a sovereign act. *See* 770 F.2d at 1393-94. That case turned upon the fact that the defendant bank was responsible for control of Nicaragua's foreign exchange. *See id.* Further, the court noted that the bank had earned no fee from the check. *See id.* at 1393. Neither situation is present here because the Ministry of the Economy in Argentina, not Banco Central, was ultimately responsible for fiscal policy and Banco Central did earn a commission. *See also Rush-Presbyterian, supra*, 877 F.2d at 578-79 n. 5 (limiting *DeSanchez* to the "extraordinary circumstances" before the court in that case); *Chisholm & Co.* v. *Bank of Jamaica*, 643 F.Supp. 1393, 1400 n. 5 (S.D.Fla. 1986) (same).

8 This is further evidenced by the circumstance that Banco Central refused to pay on the Bonods because it was directed not to by the Ministry of the Economy, not because of a policy decision by the Bank itself. *See* Decree No. 772 of May 23, 1986 (annexed to Marx Aff. as Ex. I); Resolution of Ministry of Economy of May 23, 1986 (annexed to Marx Aff. as Ex. J).

This case is therefore very similar to *Braka* and *Callejo*, *supra*, where sovereign immunity was denied in situations where banks breached an obligation to pay on certificates of deposit because they were mandated to do so by currency control regulations which they did not promulgate. The same result should and must obtain here. Although the issuance of currency control regulations may be sovereign activity, the implementation of that policy through the issuance of commercial paper is not. *See West* v. *Multibanco Comermex, S.A.*, 807 F.2d 820, 825 (9th Cir.), *cert. denied*, 482 U.S. 906, 107 S.Ct. 2483, 96 L.Ed.2d 375 (1987); *Callejo*, *supra*, 764 F.2d at 1109-10; *Braka*, *supra*, 589 F.Supp. at 1470. It follows that the issuance of the Bonods in this case was a commercial and not a sovereign act.

Having concluded that the Bank's activity in this instance was a commercial agreement to pay a sum of money, the Court must next consider whether that commercial activity had the requisite nexus with the United States. *See* 28 U.S.C. § 1605(a)(2). Since this action clearly does not involve either "commercial activity carried on in the United States" by the defendants or "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," 28 U.S.C. § 1605(a)(2), the only issue to be resolved is whether defendants' commercial activity had a direct effect in the United States. *Id.*

The Second Circuit has held that nonpayment of a debt payable in the United States to a United States company constitutes a direct effect in the United States for purposes of the FSIA. *See Texas Trading*, 647 F.2d at 312; *accord Meadows* v. *Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 484 U.S. 976, 108 S.Ct. 486, 487, 98 L.Ed.2d 485 (1987). However, that Court has left open the question of whether the same conclusion should be reached with respect to the nonpayment of a debt payable in the United States to a foreign plaintiff. *See Texas Trading*, *supra*, 647 F.2d at 312; *International Housing Ltd.* v. *Rafidain Bank Iraq*, 893 F.2d 8, 11 n. 3 (2d Cir. 1989). While it is true that with respect to a foreign plaintiff the injury may be felt elsewhere as well, *i.e.*, at the domicile of the plaintiff, that circum-

stance does not alter the fact that the act of nonpayment which causes that injury occurs in both instances in the United States. It follows that in either case there is a direct effect within the United States sufficient to meet the requirements of the FSIA. *Accord L'Europeenne de Banque* v. *La Republica de Venezuela*, 700 F.Supp. 114, 121-22 (S.D.N.Y. 1988); *see also Int'l Housing*, *supra*, 893 F.2d at 13 (Kaufman, J., dissenting) (noting trend among district courts to conclude that nonpayment of a debt to a foreign plaintiff in the United States constitutes a "direct effect").

Public policy considerations also lend support to this conclusion. The United States has a substantial interest in maintaining New York's status as an international financial center. *See L'Europeenne de Banque*, *supra*, 700 F.Supp. at 122 (citing *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d Cir.), *cert. dismissed*, 473 U.S. 934, 106 S.Ct. 30, 87 L.Ed.2d 706 (1985)). This status will be enhanced by the result reached here because businesses will, as did plaintiffs here, choose to have payments made to them through New York's financial centers if they are confident that they can utilize American courts to protect their legal rights. This choice to accept payment in New York therefore "sufficiently implicates" the United States' interest in protecting people within its territories. *See L'Europeenne de Banque*, *supra*, 700 F.Supp. at 122.

Personal Jurisdiction

Defendants also urge the Court to dismiss the complaint for lack of personal jurisdiction. However, the FSIA merges the concepts of personal and subject matter jurisdiction so that the Court has personal jurisdiction in any case in which the FSIA authorizes subject matter jurisdiction, so long as proper service is made, (which is not in dispute here), and so long as the requirements of due process are satisfied. *See* 28 U.S.C. § 1330(b); *Texas Trading*, *supra*, 647 F.2d at 308, 313; *Walpex Trading Co.* v. *Yacimientos Petroliferos Fiscales Bolivanos*, 712 F.Supp. 383, 390 (S.D.N.Y. 1989). The exer-

cise of personal jurisdiction is consistent with due process in any case where a defendant has sufficient contacts with the United States such that the exercise of jurisdiction would not offend " 'traditional notions of fair play and substantial justice.' "[9] *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940)).

This test requires that the Court assess the defendants' contacts with the United States to determine: (1) the extent to which defendants availed themselves of American law; (2) the extent to which litigation in the United States was foreseeable to them; (3) the inconvenience to defendants of litigating in the United States; and (4) the countervailing interest of the United States in hearing the suit. *Texas Trading*, *supra*, 647 F.2d at 314; *see generally*, *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414-16, 104 S.Ct. 1868, 1872-73, 80 L.Ed.2d 404 (1984); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297-98, 100 S.Ct. 559, 567-68, 62 L.Ed.2d 490 (1980); *Kulko* v. *California Superior Court*, 436 U.S. 84, 94, 98 S.Ct. 1690, 1698, 56 L.Ed.2d 132 (1978).

Thus, a defendant may be subject to personal jurisdiction, consistent with due process, both when the plaintiff's cause of action arises out of or is related to the defendant's contacts with the forum state and when it does not.[10] *See Heli-*

---

9 The personal jurisdiction analysis under the FSIA looks to the defendant's contacts with the entire United States, not just the relevant state or forum. *See Texas Trading*, *supra*, 647 F.2d at 314; *Walpex Trading*, *supra*, 712 F.Supp. at 390 n. 6; *Meadows* v. *Dominican Republic*, 628 F.Supp. 599, 606-07 (N.D.Cal. 1986), *aff'd*, 817 F.2d 517 (9th Cir.), *cert. denied*, 484 U.S. 976, 108 S.Ct. 486, 98 L.Ed.2d 485 (1987).

10 Defendants' argument that the FSIA permits personal jurisdiction only in those cases in which a plaintiff's action is related to a defendant's contacts with the United States is unsupported by both the language of the FSIA and its legislative history. Indeed, acceptance of that argument would render the "direct effect" provision of 28 U.S.C. § 1605(a)(2) superflous because that section necessarily contemplates the exercise of jurisdiction in

copteros Nacionales, *supra*, 466 U.S. at 414, 104 S.Ct. at 1872. However, in the latter case, more substantial contacts with the forum are necessary to support the exercise of personal jurisdiction. *See Walpex Trading*, *supra*, 712 F.Supp. at 390.

No serious claim can be made here that plaintiffs have failed to allege contacts of the defendants with the United States that would justify the exercise of personal jurisdiction over them. These include the following: (1) Banco Central's promise to pay plaintiffs in New York; (2) the Argentine government's maintenance of consulates throughout the country; (3) Banco Central's commercial activities in the United States; and (4) both defendants' maintenance of bank accounts in the United States. *See* Complaint at ¶¶ 8-9; Affidavit of Richard Cutler at ¶ 5 & Exs. E & F (sworn to May 29, 1990).[11]

This is especially true since the maintenance of bank accounts in the United States, protected by American laws governing the banking and insurance industries, has been held to indicate that a defendant has availed itself of American laws. *See Texas Trading*, *supra*, 647 F.2d at 314; *Hatzlachh Supply Inc.* v. *Savannah Bank of Nigeria*, 649 F.Supp. 688, 691 (S.D.N.Y. 1986). Furthermore, the circumstance that defendants agreed to pay the Bonods in United States

---

situations where all of the contacts relevant to the cause of action occur outside the United States. *See Walpex Trading*, *supra*, 712 F.Supp. at 390-91; *Meadows*, *supra*, 628 F.Supp. at 605-06. Moreover, courts in FSIA cases have considered contacts that are both related and unrelated to the plaintiff's cause of action. This is, of course, consistent with the FSIA, which permits the exercise of jurisdiction to the maximum extent permitted by due process. *See, e.g.*, *Texas Trading*, *supra*, 647 F.2d at 314-15; *Walpex Trading*, *supra*, 712 F.Supp. at 391; *Crimson Semiconductor, Inc.* v. *Electronum*, 629 F.Supp. 903, 907-08 (S.D.N.Y. 1986). *But see Exchange Nat'l Bank* v. *Empresa Minera del Centro del Peru, S.A.*, 595 F.Supp. 502, 505 (S.D.N.Y. 1984).

11 Because there has been no jurisdictional discovery in this action, plaintiffs need only allege in good faith legally sufficient allegations of jurisdiction. *See Ball* v. *Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990).

dollars in an American Bank surely made an action for breach of that obligation in the United States foreseeable. *See Schmidt* v. *Polish People's Republic*, 579 F.Supp. 23, 28 (S.D.N.Y.), *aff'd*, 742 F.2d 67 (2d Cir. 1984); *see also Hatzlachh*, *supra*, 649 F.Supp. at 691 ("where a defendant negotiates or obtains the services of a plaintiff through the use of United States mail and phone system and *agrees to pay in the United States*, litigation in the United States has been held to be foreseeable.") (emphasis added). Moreover, defendants' maintenance of a consulate and commercial offices in New York indicates that the defendants transact business here with some regularity.

Forum Non Conveniens

Finally, defendants assert that the Court should dismiss the action pursuant to the doctrine of *forum non conveniens*. That doctrine, which allows a district court to dismiss an action because other public and private interest outweigh the ordinary deference given to a plaintiff's choice of forum, is fully applicable to an action governed by the FSIA. *See Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 490 n. 15, 103 S.Ct. 1962, 1970 n. 15, 76 L.Ed.2d 81 (1983); *Crimson Semiconductor*, *supra*, 629 F.Supp. at 908. The private interests central to a *forum non conveniens* determination are the ease of access to proof and the availability of witnesses, *i.e.*, the ability to compel the presence of unwilling witnesses or the costs of transporting willing witnesses to the United States for trial. *See Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). The public interests include the administrative burden on the Court, the burden that jury duty imposes upon the community when the action has no relationship to the community and the concerns raised by the possible need to apply foreign law. *See id.* at 508-09, 67 S.Ct. at 843; *Borden, Inc.* v. *Meiji Milk Prods. Co.*, 919 F.2d 822, 827-28 (2d Cir. 1990).

An essential determination for a *forum non conveniens* inquiry is whether there is an adequate alternative forum to

resolve the dispute. *See Borden*, *supra*, 919 F.2d at 828-29; *Hatzlachh*, *supra*, 649 F.Supp. at 692; *Crimson Semiconductor*, *supra*, 629 F.Supp. at 908. Defendants in this case have not even asserted which particular forum they would relegate plaintiffs to, although it would obviously be the courts of Argentina. However, defendants have put forth no affidavits which would permit the court to conclude that Argentina is an appropriate forum. For example, there is no information in the present record which would allow the court to assess whether plaintiffs can even sue the Republic of Argentina in an Argentine court; whether plaintiffs would be able to enforce a judgment and receive American dollars in satisfaction of such a judgment; whether the action would be barred by the statute of limitations; or whether plaintiffs would have the ability to compel the testimony of witnesses. Accordingly, the court concludes that defendants have failed to show that Argentina provides an adequate alternative forum for this action. *See Hatzlachh*, *supra*, 649 F.Supp. at 692; *Crimson Semiconductor*, *supra*, 629 F.Supp. at 908-09.

Moreover, even if Argentina was a suitable alternative forum, the private interest factors listed in *Gulf Oil*, *supra*, do not support the conclusion that Argentina is a more appropriate forum for resolution of this dispute than this Court. Defendants have not provided the Court with a list of witnesses they would call at trial and their residence, which has been held to be a prerequisite for *forum non conveniens* dismissal. *See Hatzlachh*, *supra*, 649 F.Supp. at 692; *Ocean Shelf Trading Inc.* v. *Flota Mercante Grancolombiana S.A.*, 638 F.Supp. 249, 251 n. 4 (S.D.N.Y. 1986). In the absence of such information, the Court cannot assess how defendants will be prejudiced by litigation in New York. In any event, this action centers upon defendants' obligations under the Bonods and therefore the factual issues will be largely supported by documentary proof. That circumstance also renders defendants' claim of prejudice doubtful.

Finally, the Court notes that the public interest factors also militate against dismissal under *forum non conveniens*. The need to apply Argentine law, if the Court must do so, is not itself a justification for dismissal under *forum non conve-*

niens. See Manu Int'l, S.A. v. *Avon Prods., Inc.*, 641 F.2d 62, 67 (2d Cir. 1981). Moreover, since this is a non-jury trial case, *see* 28 U.S.C. § 1330(a); *see also* 28 U.S.C. § 1441(d), a local jury will not be burdened in resolving the dispute.

CONCLUSION

For the reasons set forth above, defendants Republic of Argentina and Banco Central de la Republica Argentina's motions to dismiss shall be and hereby are denied in all respects.

It is SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6001
CA 82-03706

PRACTICAL CONCEPTS, INC.,
Appellant,

v.

REPUBLIC OF BOLIVIA, et al.
[Filed Oct. 14, 1986]

Before:
Wald, Chief Judge, Ginsburg and Bork,
Circuit Judges

ORDER

This case concerns the interpretation and application of 28 U.S.C. § 1605(a)(2), the "commercial activity" exception to the immunity of a foreign state to suit in the United States. The claim-in-suit stems from a contract between plaintiff-appellant Practical Concepts, Inc. (PCI) and the Republic of Bolivia (Bolivia). Largely funded by the United States Agency for International Development, the contract provides for consulting services by PCI to Bolivia in devising and implementing a comprehensive development plan for Bolivia's rural areas. The district court held that the action was not "based on a commercial activity," 28 U.S.C. § 1605(a)(2); on that account, the court dismissed the complaint "without prejudice to resolution of the dispute in a proper forum." *Practical Concepts, Inc. v. Republic of Bolivia*, 613 F.Supp. 863, 872, *recon. denied*, 615 F.Supp. 92 (D.D.C. 1985).

The appeal was briefed by counsel for PCI and Bolivia and was argued to this court on October 6, 1986. To advance the court's just determination whether the activity in question is "commercial" within the meaning of 28 U.S.C. § 1605(a)(2), the court believes a brief amicus curiae by the United States, or the appropriate agency thereof, is desirable. Accordingly, the court invites the United States, or the appropriate agency thereof, to present its views as amicus curiae, on the application of 28 U.S.C. § 1605(a)(2) to this case, on or before November 17, 1986. The parties shall have seven days thereafter to file supplemental briefs responding to positions taken in the brief amicus curiae.

Per Curiam
FOR THE COURT:

George A. Fisher
Clerk

OPPOSITION

BRIEF